FILED BY CLERK
JAN - 6 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GILBERT ACOSTA, JR., Appellant.	2 CA-CR 2007-0194 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064210

Honorable Barbara Sattler, Judge

AFFIRMED

Jack L. Lansdale, Jr. — Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 Gilbert Acosta, Jr. was found guilty by a twelve-member jury and convicted of aggravated assault with a deadly weapon or dangerous instrument; aggravated assault of a minor under fifteen; six counts of endangerment; and one count each of criminal damage, leaving the scene of an accident involving injury, and possession of a deadly weapon by a prohibited possessor. The jury found the aggravated assault and endangerment counts were

all dangerous-nature offenses, as alleged by the state. The trial court found Acosta had two historical prior felony convictions and sentenced him to presumptive terms totaling 29.5 years' imprisonment.

¶2 Appellate counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel has complied with *Clark* by "setting forth a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97. Stating he has reviewed the record without finding an "arguable question of law" to raise on appeal, counsel asks this court to search the record for fundamental error. Acosta has not filed a supplemental brief.

¶3 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety, viewing the evidence in the light most favorable to upholding the verdicts. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). We are satisfied that the record supports counsel's recitation of the facts.

¶4 In summary, in November 2006 Acosta was driving a sport utility vehicle (SUV) with a friend, her eleven-year-old son, and Acosta's girlfriend as his passengers. The boy testified that Acosta had "pull[ed] out a gun and put it in the cup holder" when he entered the vehicle and had had another gun in his lap while he was driving. He also stated there had not previously been any guns in the vehicle before Acosta got in. When Acosta noticed a police car approaching from behind, he accelerated to approximately seventy miles

per hour. After he made a sharp left turn, the vehicle fishtailed, ultimately "flipping over" and crashing into a mobile home where a family of five had been sleeping. Acosta ran from the scene.

¶5 The boy was ejected from the SUV and suffered a broken arm, and his mother suffered multiple fractures. None of the occupants of the mobile home were physically injured, although one of the children was traumatized by the event, and the home itself was destroyed. The weapon the boy had seen Acosta place in the vehicle's cupholder was found near the crash site. In a post-arrest interview with a police detective, Acosta said he fled from the police vehicle because there were guns in the SUV and he knew he was not supposed to be around guns because of his criminal record.

¶6 Counsel suggests "[t]he Trial Court's failure to sever the Prohibited Possessor count gives rise to the appearance of an arguable issue" because that offense requires proof of a felony conviction, which may be prejudicial to a defense against other charges. As counsel recognizes, however, "When a defendant challenges a denial of severance on appeal, he 'must demonstrate compelling prejudice against which the trial court was unable to protect.'" *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995), *quoting State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983); *see also State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (2003).

¶7 We see no such prejudice here in light of the strong evidence against Acosta on the other offenses charged and, in particular, in light of Acosta's own statement that he was evading police because he knew he was a prohibited possessor of firearms. *See State v.*

Johnson, 212 Ariz. 425, ¶ 11, 133 P.3d 735, 739-40 (2006) (prejudice unlikely if evidence of offense would have been admissible in separate trial on other charges). In addition, any prejudice would have been mitigated by the trial court's instructions that the jury consider each offense separately, "uninfluenced by [its] decision as to any other count," and that the prior felony conviction be considered only "as an element of the offense of prohibited possessor and not for any other purpose." *See id.* ¶ 13. "We presume jurors follow instructions." *State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007).

¶8 Substantial evidence supported all elements necessary for Acosta's convictions, and his historical prior felony convictions were established by clear and convincing evidence. Furthermore, the sentences imposed were within the statutory range authorized by A.R.S. § 13-604. In our examination of the record pursuant to *Anders*, we have found no error requiring reversal and no arguable issue requiring further appellate review. *Anders*, 386 U.S. at 744. We therefore affirm Acosta's convictions and sentences.

_____

JOHN PELANDER, Chief Judge

CONCURRING:

_____

JOSEPH W. HOWARD, Presiding Judge

_____

J. WILLIAM BRAMMER, JR., Judge